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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

In re the Marriage of GORDON WATSON and HEATHER CONREY.	H042367 (Santa Cruz County Super. Ct. No. FL037063)
GORDON WATSON, Respondent, v. HEATHER CONREY, Appellant.	

Appellant Heather Conrey appeals from a domestic violence restraining order issued on behalf of respondent Gordon Watson, her husband, and Emily, their daughter.[1] The order is affirmed.

I. Factual and Procedural Background

While dissolution proceedings were pending, respondent filed a request for a domestic violence restraining order under the Domestic Violence Prevention Act (DVPA)

[1] Respondent has not filed a brief on appeal.

(Fam. Code, § 6200 et seq.).[2] The trial court issued a temporary restraining order prohibiting appellant from contact with respondent and their 11-year-old daughter.

On April 23, 2015, a hearing was held. Respondent testified regarding the events at the parties' home on March 27, 2015. At about 11:00 p.m., respondent was lying in bed after he had said good night to Emily. Emily was in appellant's bedroom, which is next to respondent's bedroom. Appellant "stormed" into respondent's bedroom and asked, "Why didn't you say good night to Emily?" Appellant then began repeatedly hitting respondent with closed fists.[3] Respondent held up his left arm and moved away from her. When it appeared that she was about to "lunge on top" of him, defendant ordered her out of his room. After appellant left, respondent put a metal chair underneath the door handle and sat on the chair. About 10 minutes later, appellant returned and hit the door "full force" with her shoulder eight times. She also said, "What? Are you fucking recording me?" She left and returned about 30 minutes later. At that point, she attempted again to break into respondent's bedroom by striking the door 10 times. Respondent was "[t]errified" by her behavior because there was a Glock .40 in the house.

Respondent also testified that appellant had scratched and pushed him in recent months. He denied that he had ever physically assaulted her. Respondent described appellant as "highly unstable" and he was concerned because appellant's inappropriate behavior had escalated. He also testified that appellant had vandalized his truck and caused a disturbance at his workplace. Respondent included Emily in the request for a restraining order, because appellant was "highly abusive" and assaulted him in their home in front of Emily.

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[2] All further statutory references are to the Family Code unless stated otherwise.

[3] The trial court described respondent's demonstration of appellant's behavior: "You are using both your right and your left hand. They're both in fists. There's a forward punch with a right fist then a forward punch with a left fist then a forward punch --"

Appellant testified that she never hit respondent or tried to break the door to his bedroom. According to appellant, Emily was in appellant's bedroom and watching a movie on her iPad when the March 27, 2015 incident occurred. Appellant also denied vandalizing his truck.

At the conclusion of the hearing, the trial court specifically found that appellant was not credible. The trial court issued a one-year restraining order against appellant and named both respondent and Emily as protected persons. The order also awarded respondent sole physical and legal custody of Emily and required appellant to pay the costs of three supervised visits per week with Emily.

On June 12, 2015, while this appeal was pending, the trial court issued an order which stated in relevant part: "The Court shall adopt Family Court Services recommendation of parties' visitation to be 3 day on/3 day off schedule to coincide with [respondent's] schedule."[4] Nothing in this order refers to the restraining order.

II. Discussion

A. Mootness

Appellant asserts that the visitation order in June 2015 does not moot the appeal.

"'An appellate court will not review questions which are moot and which are only of academic importance.' [Citations.] A question becomes moot when, pending an appeal from a judgment of a trial court, events transpire that prevent the appellate court from granting any effectual relief. [Citations.]" (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 419.)

As appellant points out, a finding of abuse within the meaning of the DVPA triggers the presumption against custody in section 3044 and will prejudice her in future

[4] Appellant's request for judicial notice of the minute court order, dated June 12, 2015, is granted. (Evid. Code, § 452, subd. (d).)

custody decisions. (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1267-1268 (*S.M.*).) Appellant was also ordered to pay the fees for supervised visitation. Thus, the restraining order does not moot the present appeal.

B. The DVPA

The DVPA was enacted "to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence." (§ 6220.) Domestic violence is defined by the DVPA as "abuse" of certain persons, including a spouse. (§ 6211.) "'[A]buse'" is defined by the DVPA to include the following: "(a) . . . (1) Intentionally or recklessly to cause or attempt to cause bodily injury. [¶] . . . [¶] (3) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another. [¶] (4) To engage in any behavior that has been or could be enjoined pursuant to Section 6320. [¶] (b) Abuse is not limited to the actual infliction of physical injury or assault." (Former § 6203.) Behavior that could be enjoined pursuant to section 6320 includes "disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members." (§ 6320.) As this court has stated, "the plain meaning of the phrase 'disturbing the peace of the other party' in section 6320 may be properly understood as conduct that destroys the mental or emotional calm of the other party." (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497.)

C. Standard of Review

This court reviews a grant of injunctive relief under the DPVA for abuse of discretion. (*Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 782.) "'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason.'"

(*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420 (*Gonzalez*).) We review the trial court's factual findings in support of its order for substantial evidence. (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822.) "Our sole inquiry is 'whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted,' supporting the court's finding. [Citation.] 'We must accept as true all evidence . . . tending to establish the correctness of the trial court's findings . . . , resolving every conflict in favor of the judgment.' [Citation.]" (*Id.* at pp. 822-823.) We must also "draw all reasonable inferences from the evidence to support the findings and orders of the [trial] court." (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193 (*Heather A.*).) Moreover, "'the power to judge the credibility of the witnesses . . . is vested in the trial court.' [Citations.]" (*In re Arturo D.* (2002) 27 Cal.4th 60, 77.)

D. Sufficiency of the Evidence

Appellant contends that the trial court erred in naming Emily as a protected person, because there was no evidence that Emily suffered abuse as defined by the DVPA. She also contends that respondent failed to show good cause for including Emily in the restraining order. We disagree.

Here, Emily was in the bedroom next to respondent's bedroom when appellant repeatedly hit respondent. Appellant subsequently attempted 18 times to break down the door to his bedroom. The trial court could have reasonably concluded that her mother's violent conduct against her father destroyed the mental or emotional calm of 11-year-old Emily. Thus, there was substantial evidence that appellant abused Emily within the meaning of the DVPA and good cause justified including her in the restraining order.

Appellant argues, however, that Emily was watching a movie during the altercation. We first note that the trial court found appellant's testimony not credible. Even assuming that Emily was watching a movie, the trial court could have reasonably

inferred that since Emily was in the next room, appellant's attack on respondent and the repeated attempts to enter his room were loud enough for Emily to hear.

Appellant also contends that if Emily had heard the attack, she would have gone "to see what was happening or if help was needed. That she did not suggests she was not disturbed and therefore did not suffer the requisite abuse." However, appellant has ignored the appropriate standard of review which requires that this court draw all reasonable inferences in favor of the trial court's order. (*Heather A., supra*, 52 Cal.App.4th at p. 193.)

E. Factors Considered by the Trial Court

Appellant next contends that the trial court considered improper factors and misapplied the DVPA.

Following argument, the trial court explained why it did not find appellant credible by focusing on various portions of her testimony which did "not make any sense at all." The trial court referred to: appellant's claim that she did not have keys to respondent's truck; an incident in which appellant interrupted a phone call with her sister about their dying mother to check on whether she had locked her trunk to prevent respondent from taking her papers; her claim that she did not contact the police after respondent punched her in the jaw because she needed to return to her phone call about her mother; appellant's failure to tell a police officer that respondent had threatened to cut her in half with a chainsaw; appellant's claim that she did not know what Spyware was even though she had been a deputy sheriff; the illegal recordings of respondent by appellant; and appellant's outrage at the suggestion that respondent had ever cheated on her which was inconsistent with her claim that he repeatedly visited prostitutes. The trial court concluded: "So I'm going to find [respondent] has borne his burden of proof. I'm

going to grant the restraining order. Sole legal and physical custody of Emily goes to [respondent] as a result of Court's orders today."

After a recess, the trial court stated that it had reviewed its notes and wanted to add that appellant was clearly the aggressor on March 27. The trial court then stated: "With respect to when [appellant] was served with the restraining order, her own testimony was she heard her daughter Emily crying in the hallway in a way that she had never heard her daughter cry before, something that was different. [¶] She didn't know what was going on. So the first thing she does is press the record on her phone, not rush out to see what's upsetting her daughter, not go out to see what was the matter. The first thing she thinks to do is press record. And then her daughter is exhibiting this great distress, and her testimony is, 'I didn't want to upset her anymore, so I didn't comfort her. She was interacting with her father, and I didn't want to interfere with that.' [¶] That just doesn't make any sense to me, and it contributed to my findings in this matter."

Appellant argues that the trial court's comments after the recess indicate that the trial court erroneously considered appellant's recording of her daughter as abuse. We disagree with appellant's interpretation of the trial court's comments. This incident was another example of appellant's testimony which did not make any sense to the trial court, thus leading it to doubt appellant's credibility.

Appellant also claims that the trial court "conclusion that unsubstantiated possibilities justify a restraining order derives from a misapplication of the statute." Appellant refers to the following comments by the trial court: "A person who does that [put a recording device on respondent's truck], I'm not entirely sure can restrain those desires when she's with her daughter. I envision her pumping Emily for all sorts of information. I envision her telling Emily to be her little spy and send her things." However, the portion of the transcript on which appellant relies does not support her claim.

After granting the restraining order, the trial court set the date for the next hearing and stated: "And now we have to discuss what to do between now and the mediation appointment date." The trial court stated: "I'm struggling with the supervision aspect of visitation. I'm very disturbed by [appellant]. I think some of her behavior is very, very disturbing, and I'm concerned about it. I'm trying to decide what's necessary." After counsel made various comments, the trial court stated: "I have difficulty with a mother who chooses to videotape her daughter rather than comfort her. That's deeply disturbing. Deeply disturbing. I also have evidence of behavior that I think is also disturbing of stalking. There was a very strong suggestion, which I'm inclined to believe, that she put some sort of recording device surreptitiously on his truck or something else. [¶] This is out of control. A person who does that, I'm not entirely sure can restrain those desires when she's with her daughter. I envision her pumping Emily for all sorts of information. I envision her telling Emily to be her little spy and send her things. I envision all these things. I hope they're all wrong, but I'm worried about them. That's a terrible, terrible position to put a little girl in. [¶] I'm not sure she can restrain herself from doing that. That's my concern. I don't believe she'll hurt Emily in any way physically. Please do not misunderstand me. I don't believe that. But I think there's a tremendous potential for emotional damage to this child because of the breakup of this relationship." Following argument, the trial court ordered the parties to take a coparenting education class and supervised visitation for appellant.

Here, the record establishes that the trial court had already granted the restraining order when it made the comments now challenged by appellant. These comments were made as the trial court was trying to determine whether to order supervised visitation. Thus, the trial court did not restrain appellant's future behavior based on speculation.

F. Exclusion of Evidence

Appellant argues that the trial court erred when it excluded "evidence that *may* have shown [appellant] was not engaging in any sort of 'abuse' toward Emily." (Capitalization & boldface omitted & italics added.)

Jill Litzenberger, appellant's friend, was called to testify. Litzenberger's daughter and Emily are friends. The following exchange occurred: "Q . . . Has Emily talked to you about what's going on with her parents? [¶] A Yes. [¶] Q And what has Emily stated to you? [¶] THE COURT: I'm going to interpose my own objection. [¶] [APPELLANT'S COUNSEL]: Pardon. [¶] THE COURT: I'm going to interpose my own objection. [¶] [APPELLANT'S COUNSEL]: It would go to her state of mind, Your Honor. [¶] THE COURT: No. I'm not going to allow it. [¶] [APPELLANT'S COUNSEL]: All right."

Later, appellant's counsel tried to elicit further testimony from Litzenberger. "[APPELLANT'S COUNSEL]: May I inquire, Your Honor, as to her observations as to how Emily has been in the past three weeks? [¶] THE COURT: No."

Appellant argues that "it would have been futile for [her] counsel to continue trying to elicit testimony to refute the allegations of abuse."

In order to succeed on appeal, an appellant is required to establish: where in the record she demonstrated "[t]he substance, purpose, and relevance of the excluded evidence was made known to the [trial] court" (Evid. Code, § 354, subd. (a)); the error in excluding the evidence; and whether the error resulted in a miscarriage of justice (Cal. Const., art. VI, § 13; Evid. Code, § 354).

Here, appellant failed to demonstrate the substance of Litzenberger's testimony, its purpose, and its relevance to the issues at the hearing, the error in excluding the evidence, and whether the error was prejudicial. Accordingly, appellant has not met her burden to

show that the trial court abused its discretion when it excluded some of Litzenberger's testimony and that any error was prejudicial.

G. Stay Away Order

Relying on *S.M., supra,* 184 Cal.App.4th at pp. 1265-1266, appellant argues that "the order is overly broad because it restrains [her] from acts she has not committed. . . . In the absence of evidence that she committed abuse at Emily's school, it is an abuse of discretion to issue a protective order restraining her from doing so." There is no merit to this argument.

At issue in *S.M., supra,* 184 Cal.App.4th at pp. 1265-1266 was the sufficiency of the evidence to support the trial court's finding of abuse. As previously discussed, here, the trial court found that appellant committed abuse against Emily within the meaning of the DVPA. Thus, appellant was ordered to stay at least 100 yards away from Emily. She was also ordered to stay at least 100 yards away from Emily's school, thereby preventing her from coming into contact with Emily.

III. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.

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